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No. 1323

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

THE STATE OF IDAHO,

Plaintiff-Respondent,

-vs-

JAMES B. POLSON,

Defendant-Appellant.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

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CITATIONS

UNITED STATES CONSTITUTION:

Article 1, Section 10
Amendment 5
Amendment 8
Amendment 13
Amendment 14

UNITED STATES STATUTES:

28 USC 1257

IDAHO STATUTES:

18-4015
19-2514

CASES:

State of Idaho v. Polson, 448 P2d 229

Sheppard v. Maxwell, 384 US 333, 86 SCt 1507

Estes v. Texas, 381 US 532, 14 L ed 2d 543, 85 SCt 1628

Irvin v. Dowd, 366 US 717, 6 L ed 2d 751, 81 SCt 1639

Marshall v. United States, 360 US 310, 3 L ed 2d 1250, 79 SCt 1171

State v. Scroggins, 91 Ida 847, 433 P2d 117

Calder v. Bull, 3 Dall. (US) 386, 1 L ed 648

Rupert v. State, 9 Okla Crim. 226, 131 Pac. 713

United States v. Dowd, 271 Fed 2d 292

OPINIONS BELOW

Defendant was charged, and convicted, by jury verdict, in the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville, of the crime of assault with intent to commit murder, and of being a persistent violator of the law. There is no opinion from said court. The judgment of conviction on both counts was appealed to the Supreme Court of the State of Idaho, which court affirmed the conviction of the charge of assault with intent to commit murder, but reversed the conviction of being a persistent violator of the law and remanded the matter for new trial upon that charge alone. The opinion and decision of the Idaho Supreme Court entered December 9, 1968, is reported at 448 Pac. 2d 229. (Rehearing denied January 3, 1969.)

JURISDICTION

Jurisdiction is invoked in this cause pursuant to 28 USC 1257, for the review of a state supreme court decision and also because this case involves a serious question of pretrial publicity and publicity during trial which resulted in an atmosphere in which the defendant was denied a fair trial in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States; further that this cause involves the application of a recidivism statute in violation of the double jeopardy and due process of law provisions of Amendment 5 and 14 to the United States Constitution, of Article 10 of the Constitution prohibiting the enactment of ex post facto laws, of Amendment 8 to the Constitution prohibiting cruel and unusual punishment, and of Amendment 13 to the Constitution prohibiting involuntary servitude except as punishment for a crime.

QUESTIONS PRESENTED

1. Was the petitioner denied due process of law as a result of pretrial publicity and publicity during trial, which resulted in an atmosphere denying the petitioner a fair trial.

2. Is the Idaho recidivist statute as applied to this petitioner violative of the provisions of the United States Constitution forbidding

(a) ex post facto laws

(b) double jeopardy

(c) cruel and unusual punishment

(d) denial of due process and equal protection of the law

(e) involuntary servitude.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional and statutory provisions are set forth in Appendix A, infra:

UNITED STATES CONSTITUTION:

Article 1, Section 10

Amendment 5

Amendment 8

Amendment 14

Amendment 13

UNITED STATES STATUTES:

28 USC 1257

IDAHO STATUTES

18-4015

19-2514

STATEMENT

Petitioner was arrested upon a charge of assault with a deadly weapon with intent to murder, under Idaho Code Section 18-4015, following a shooting incident in Idaho Falls, Idaho, on May 2, 1966. The petitioner and one Carl Holm, a longstanding acquaintance, were both in possession of pistols and exchanged shots with each other in a bar on said date; the petitioner was wounded, but Holm was not.

Following trial and conviction upon said charge, the petitioner was also tried for being a persistent violator of the law under Idaho's recidivism statute, Section 19-2514, Idaho Code.

Petitioner was sentenced to serve the maximum penalty of 14 years imprisonment upon the assault charge, and to an additional 10 years on the conviction of recidivism.

Upon appeal to the Idaho Supreme Court, the conviction of assault with a deadly weapon with intent to murder was affirmed and the conviction for being a persistent violator of the law was reversed and remanded for a new trial.

Certain errors occurred in the charging, trial, sentencing and appeal of the petitioner that we deem to be in violation of the rights afforded him under the United States Constitution.

REASONS FOR GRANTING WRIT

Writ of certiorari should be granted to review

the matters raised as follows, under the sub-headings of Publicity, Ex post facto, Double Jeopardy, Cruel and Unusual Punishment, Due Process and Equal Protection of the Laws, and Involuntary Servitude.

(A) Publicity.

During the trial of petitioner, it was brought to the attention of the trial court, that extensive publicity had occurred prior to the trial. The affidavit of the petitioner's trial attorney, Robert Hillman (who is since deceased), is included in the record submitted by the Clerk of the Supreme Court of the State of Idaho to show the nature and extent of the publicity involved. The Court was aware of this publicity and noted, during trial:

> "THE COURT: Now, lady and gentlemen of the jury, counsel for the defendant advises me that last evening on one of the television stations there was something concerning this trial. I want to admonish the jury that whatever might have been on that television set could

never have been more than the opinion of one writer. It could have nothing to do with this trial, and I would admonish you to pay absolutely no attention to it, whatever.

"This would come up in connection with the so-called new rights of the people to know, I presume. But, in any event, it would not have anything to do with your determination in this case.

"I don't know how many of you saw this broadcast. I didn't. But it something I feel ought to be called to your attention, and therefore I am admonishing you concerning it.

"What you will determine will come from this witness stand, and no place else. And what I will get the law on in connection with this case will come from the cases as it applies to the evidence in this case."

The affidavit of petitioner's attorney, Mr. Hillman, indicates that this publicity was sufficient to cause the jury to form a preconception of guilt and thus prevent them from arriving at a fair and independent verdict.

The Honorable Supreme Court of the United States of America in recent years has jealously

protected the right of due process granted to defendants via the 14th Amendment when adverse and prejudicial publicity permeates the trial atmosphere.

In Sheppard v. Maxwell, 384 US 333, 16 L ed 2d 600, 86 S. Ct. 1507, the court said:

> "From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances. Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. In addition, sequestration of the jury was something the judge should have raised sua sponte with counsel. If publicity during the proceedings

> threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures."

Although the Sheppard trial was described as a "'Roman Holiday' for the news media" and a "carnival atmosphere at trial", the court set the guidelines of due process applicable to such situations, and applicable also to the position of the petitioner, contrary to the holding of the Supreme Court of the State of Idaho, that in the petitioner's case "the record does not show an aura of community prejudice from the publicity

complained of; that the defendant's case was prejudicial; that he was denied a fair trial; or that he was denied due process of law;" (448 P2 at 235), the United States Supreme Court in Estes v. Texas, 381 US 532, 14 L ed 2d 543, 85 S Ct 1628, at page 542 of the U S Reports espoused:

> "The State, however, says that the use of television in the instant case was 'without injustice to the person immediately concerned,' basing its position on the fact that the petitioner has established no isolatable prejudice and that this must be shown in order to invalidate a conviction in these circumstances. The State paints too broadly in this contention, for this Court itself has found instances in which a showing of actual prejudice is not a prerequisite to reversal. This is such a case. It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process."

Irvin v. Dowd, 366 US 717, 6 L ed 2d 751, 81 S Ct 1639, in discussing the effect of news upon

the community from which a jury is to be drawn recognizes "'Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the court lays down no particular tests and procedure is not chained to any ancient and artificial formula.

"Here the build up of prejudice is clear and convincing. An examination of the then current community pattern of thought as indicated by the popular news media is singularly revealing."

The court then goes on to detail the inflammatory adverse publicity associated with that case; not unlike the atmosphere and stories relating to petitioner herein. It would be unrealistic to say that the continued adverse publicity did not result in the education and informing of the community in a biased and aroused manner.

Marshall v. United States, 360 US 310,

3 L ed 2d 1250, 79 S Ct 1171, is another case which this court summarily dealt with the exposure of the venire to adverse trial publicity. There it was held that although the trial judge did not feel that there was any prejudice to the defendant from the jury obtaining information from newspaper articles, which information consisted of inadmissible evidence, the defendant was entitled to a new trial free from such an aura that might have affected the jury's deliberation.

It must be noted to this Honorable Court, that the Idaho Supreme Court, in denying petitioner's contention regarding prejudicial publicity, relied upon its recent decision of State v. Scroggins, 91 Idaho 847, 433 P2d 117 (1967). That case involved one newspaper article; not eleven as we have in the present case.

(B) Ex post facto.

Article 1, Section 10, of the United States Constitution provides inter alia that "no state shall * * * pass any * * * ex post facto law, * * *" An ex post facto law has been defined as one that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed.

Calder v. Bull, 3 Dall. (US) 386, 1 L ed 648.

Applying these rules to the case at hand, we would argue that petitioner, when charged with violating Idaho Code Section 19-2514, the recidivism statute, was subjected to an ex post facto law, for that law imposes a greater punishment for criminal conduct, upon third conviction, regardless of the crime (as long as it is a felony) than would or could be imposed for the prior offenses. The various offenses are not punishable in increasing degrees based upon number of occurrence, except for the recidivism statute.

It is not logical nor realistic to say that the application of the recidivist provision is not an ex post facto situation.

(C) Double Jeopardy.

Amendment 5 to the United States Constitution provides in part that "* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * *"

This provision protects an accused against peril of a second punishment for the same criminal conduct.

See Rupert v. State, 9 Okla Cr. 226, 131 Pac. 713.

It is submitted that application of the recidivist statute of Idaho, Section 19-2514, Idaho Code, in this case amounts to double jeopardy. Petitioner has been convicted of three felonies, sentenced therefor, and served his debt to society for said acts. To assess additional punishment, based upon

prior conduct for which the petitioner has been punished, again, in both reason and logic, can amount to nothing more than double punishment, in contravention of Amendment 5 of the Constitution.

(D) Cruel and Unusual Punishment.

Amendment 8 of the Constitution of the United States states that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." (Emphasis supplied)

Idaho's various criminal statutes provide for the maximum fine and punishments for violation thereof. These punishments are the usual punishments for breach of the statutes. Application of the recidivist statute to a third felony which would otherwise be punished in the usual manner applicable to the prior two felonies, would be unusual or not usual punishment and

would be in contravention of the provisions of Amendment 8 of the Constitution. To say otherwise would be closing our eyes to reality.

(E) Due Process and Equal Protection.

Amendment 14 to the Constitution of the United States places the following restriction upon the various states:

> "nor shall any state deprive any person of life, limb, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The terms "due process" and "equal protection of the laws" encompass a fundamental principle of justice circumscribing the power of the government with a substantive control, guaranteeing to the individual that he shall be treated in no different manner than other individuals and that his treatment shall be according to established rules and procedure. The problem that we face with recidivist statutes such as exist

in Idaho, is that the accused is treated differently than others; is subject to greater sanctions and punishments than are normally applied to first or second offenders; and is placed in the position of being discriminated against, depending on the whim of the prosecutor, who has the sole, omnipotent choice of who shall be selected to be charged under the statute.

(F) Involuntary Servitude.

Amendment 13 to the Constitution of the United States provides that "neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

There are authorities on both sides of the question of whether recidivist statutes are a crime, or whether they are merely a status which entitles a court to assess additional punish-

ment. Most cases follow the latter approach. Typical of this is the statement of the Seventh Circuit Court of Appeals in the case of U. S. v. Dowd, 271 F2d 292, wherein it is stated at page 295 of the Federal Report:

> "The state or condition of being a habitual criminal is not a crime but it is a status or circumstance which affords a proper basis for classifying such individual as one subject to greater or additional punishment than would otherwise be imposed upon conviction of a subsequent offense."

As argument, we urge the position of Judge Parkinson, who dissented in the Dowd case. The 13th Amendment does not read "punishment incidental to crime", nor "punishment for criminal conduct by commission of repetitive felonies for which the full statutory punishment has been inflicted". It clearly and succinctly states "as a punishment for crime".

It is submitted that punishment for a status, not for a crime, clearly violates the 13th Amendment.

CONCLUSION

It is respectfully presented herein that this court should accept certiorari in this matter by issuance of its writ, to review the constitutional issues raised herein.

WHEREFORE, petitioner prays for issuance of a writ of certiorari.

Dated this 31st day of March, 1969.

Respectfully submitted,

DERR, DERR & WALTERS

By _____
Allen R. Derr, Of the Firm.
817 W. Franklin Street
Boise, Idaho 83702

I hereby certify that on April 1, 1969, I served a true and correct copy of the foregoing Petition for Writ of Certiorari by mail, postage prepaid, on the Attorney General of the State of Idaho and the Prosecuting Attorney of Bonneville County, State of Idaho.

_____
Allen R. Derr

United States Constitution, Article 1, Section 10:

"(1) No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

"(2) No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to revision and control of the congress.

"(3) No state shall, without the consent of congress, lay any duty of tonnage, keep troops, or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

United States Constitution, Amendment 5:

"(CRIMINAL ACTIONS--PROVISIONS CONCERNING--DUE PROCESS OF LAW AND JUST COMPENSATION CLAUSES.)--No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution; Amendment 8:

"(BAIL--PUNISHMENT.)--Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

United States Constitution, Amendment 14:

"Section 1. (CITIZENSHIP--DUE PROCESS OF LAW--EQUAL PROTECTION.)--All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Section 2. (REPRESENTATIVES--POWER TO REDUCE APPORTIONMENT.)--Representatives shall be apportioned among the several states according to their respective numbers, counting

the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

"Section 3. (DISQUALIFICATION TO HOLD OFFICE.)--No person shall be a senator or representative in congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may by a vote of two-thirds of each house, remove such disability.

"Section 4. (PUBLIC DEBT NOT TO BE QUESTIONED--DEBTS OF CONFEDERACY AND CLAIMS NOT TO BE PAID.)--The validity of the

public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

"Section 5. (POWER TO ENFORCE AMENDMENT.)--The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

United States Constitution, Amendment 13:

"Section 1. (SLAVERY PROHIBITED.)--Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"Section 2. (POWER TO ENFORCE ARTICLE.)--Congress shall have power to enforce this article by appropriate legislation."

United States Statute, 28-1257:

"STATE COURTS; APPEAL; CERTIORARI.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

Idaho Statute, 18-4015:

"ASSAULT WITH INTENT TO MURDER. -- Every person who assaults another with intent to commit murder, is punishable by imprisonment in the state prison not less than one nor more than fourteen years."

Idaho Statute, 19-2514:

"PERSISTENT VIOLATOR--SENTENCE ON THIRD CONVICTION FOR FELONY. --Any person convicted for the third time of the commission of a felony, whether the previous convictions were had within the state of Idaho or were had outside the state of Idaho, shall be considered a persistent violator of law, and on such third conviction shall be sentenced to imprisonment in the state penitentiary for not less than five years and said imprisonment may extend to life."

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-vs-

THE STATE OF IDAHO,

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OPINION OF IDAHO SUPREME COURT; Appendix to
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OF IDAHO

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IN THE SUPREME COURT OF THE STATE OF IDAHO

No. 9944

THE STATE OF IDAHO,
Plaintiff-Respondent,
v.
JAMES B. POLSON,
Defendant-Appellant.

Pocatello, September Term 1968

Filed: Dec. 9, 1968

Martin V. Huff, Clerk

Appeal from the District Court of the Seventh Judicial District, Bonneville County. Honorable Henry S. Martin, District Judge.

Defendant appeals from judgment entered upon conviction of assault with intent to murder and of being a persistent violator. Affirmed in part, reversed in part, and cause remanded.

Derr, Derr & Walters, Boise, for appellant.

Allan G. Shepard, Attorney General, and Roger B. Wright, Deputy Attorney General, Boise, and Jack G. Voshell, Prosecuting Attorney, Idaho Falls, for respondent.

TAYLOR, J.

James B. Polson was convicted and adjudged guilty of assault with intent to murder, a felony,[1]

1. "Every person who assaults another with intent to commit murder, is punishable by imprisonment in the state prison not less than one nor more than fourteen years." I.C. Section 18-4015.

and of being a persistent violator.[2] He was sentenced to a term of 14 years imprisonment in the penitentiary for the crime of assault with intent to murder, and to an additional 10 years on his conviction of recidivism. The charge arose out of a shooting incident which occurred at a bar in Idaho Falls, on the morning of May 2, 1966. Defendant was in the bar in company with one Joe Dunn. The complaining witness Carl Holm was in the bar in company with one Don Fedder. All were long-standing acquaintances, but apparently there was "bad blood" between defendant and Holm. The bartender was the only other eyewitness to the gunplay. Holm and defendant both carried hand guns from which they exchanged shots at each other. During the exchange Fedder and defendant were wounded. There was competent evidence, though conflicting, to indicate that defendant drew his gun and fired before Holm retaliated. There was also evidence indicating that defendant instigated the fight, seeking to revenge a beating he had suffered a day or two earlier at the hands of Holm.

2. "Any person convicted for the third time of the commission of a felony, whether the previous convictions were had within the state of Idaho or were had outside the state of Idaho, shall be considered a persistent violator of law, and on such third conviction shall be sentenced to imprisonment in the state penitentiary for not less than five years and said imprisonment may extend to life." I.C. Section 19-2514.

By his first assignment of error defendant urged that the court erred in entering a judgment of conviction upon the verdict of the jury finding him guilty of "assault with intent to commit murder." Defendant's contention is that the crime of which he was found guilty was not charged in the information. The information designates the crime charged as "Assault With a Deadly Weapon With Intent to Murder." The information then sets out the commission of the crime as follows:

> "That the said defendant, James B. Polson, then and there being, did then and there wilfully, unlawfully, feloniously and with malice aforethought, by means of a certain deadly weapon, that is a loaded revolver, which he, the said defendant in his hands then and there held, did make an assault upon the person of one Carl Holm, a human being, by shooting said loaded pistol at the person of said Carl Holm, he being within range of the said pistol, with the intent then and there to wilfully, unlawfully, intentionally and feloniously and with malice aforethought, kill and murder the same Carl Holm, which assault was likely to and could have produced great, severe and mortal injury to the said Carl Holm."

Assault with a deadly weapon is defined in I.C. Section 18-906. [3]

---

3. "Every person who commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable by imprisonment in the state prison not exceeding two years, or by fine not exceeding $5000, or by both." I.C. § 18-906

Our statute requires that an information contain:

> "2. A statement of the acts constituting the offense in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." I.C. §19-1409. See I.C. §§19-1303, 19-1304, 19-1411.

It is proper, and in some cases necessary, to set out in the information the means by, and the manner in, which a crime is committed. State v. McMahan, 57 Idaho 240, 65 P.2d 156 (1937). The information in this case properly charges both the crime of assault with intent to murder and the included offense of assault with a deadly weapon. State v. Missenberger 86 Idaho 321, 386 P.2d 559 (1963); cf. I.C. §19-2312. The fact that the information did not separately name the two offenses in no way prejudiced defendant. State v. Davidson, 78 Idaho 553, 309 P.2d 211 (1957); State v. Farnsworth, 51 Idaho 768, 10 P.2d 295 (1932); State v. Holder, 49 Idaho 514, 290 P. 387 (1930); State v. Altwalter, 29 Idaho 107, 156 P. 256 (1916); State v. Curtis, 29 Idaho 724, at 730, 731, 161 P. 578 (1916); I.C. § 19-1419; see also I.C. § 19-1418.

Defendant contends that the trial court erred in permitting the state to call Carl Holm as a

witness and, in the presence of the jury, extract from him a refusal to testify on the ground that his testimony would tend to incriminate him; also the action of the court in permitting the prosecuting attorney, in the presence of the jury, to grant immunity to the witness Holm in exchange for his waiver of his privilege against self-incrimination, and the action of the court in advising the witness Holm, in the presence of the jury, that his testimony could not possibly tend to incriminate him. The entire record, so far as these assignments are concerned, is as follows:

> "Carl Holm produced as a witness by and on behalf of the State, being first duly sworn, was examined, and testified as follows: * * *
>
> "Q (By Mr. Voshell) Will you please state your name?
>
> "A Carl Holm.
>
> "Q Where do you reside?
>
> "A Downstairs in the county jail.
>
> "Q Are you acquainted with the defendant, James Polson?
>
> "A I refuse to answer that question.
>
> "THE COURT: Answer the question, Mr. Holm.
>
> "A I refuse to answer on the ground it may tend to incriminate me.
>
> "THE COURT: Mr. Voshell, are you prepared to grant this witness immunity?
>
> "MR. VOSHELL: Yes, your Honor.

"THE COURT: Answer,Mr. Holm.

"MR. VOSHELL: We will forego prosecution of Mr. Holm on any offense, providing, of course, he answers all of the questions with truth and honesty.

"THE COURT: Besides, this couldn't possibly -- couldn't possibly tend to incriminate you, Mr. Holm.

"MR. VOSHELL: Of course, your Honor, we understand that this would not include waiving prosecution of Mr. Holm for perjury. We reserve the right, of course, to prosecute him for perjury, if that should, of course, appear.

"MR. HILLMAN: Your Honor, am I to understand you are granting immunity to this witness as to this particular charge?

"MR. VOSHELL: Yes, Mr. Hillman.

"MR. HILLMAN: That charge of assault with intent to kill?

"MR VOSHELL: No. If I might state this, Mr. Hillman, that the immunity that the State offers Mr. Holm in this case is that he cannot be compelled to be a witness against himself in any criminal proceedings, and we certainly will not use any of his testimony that is adduced here today for any purpose of prosecution. And that is his immunity under the statute, I believe, your Honor.

"MR. HILLMAN: Your Honor, I am going to lodge my objection to that motion, upon this ground, that the defendant who is presently before the court might well be the complaining witness and might have the perfect right to be the complaining witness in a

prosecution of Mr. Holm on account of the incident that occurred on May second, Nineteen sixty-six, at the Holiday Inn. I think he has this right as a citizen of the State of Idaho and of the United States of America.

"MR. VOSHELL: In which case, your Honor, the State would not use any testimony of Mr. Holm in that trial against Mr. Holm.

"THE COURT: That's right. That's all it is.

"MR. HILLMAN: Would the defense be allowed to use that testimony?

"THE COURT: That would be a matter to be --

"MR. HILLMAN: (Interrupting) In other words --

"THE COURT: That would be a matter to be decided when that comes up.

"MR. VOSHELL: That would be Mr. Holm's privilege to decide, as a defendant, whether he wanted to use his own testimony or not. But the State would not use it.

"MR. HILLMAN: What about the complaining witness, he has nothing to say about this? That's what I am getting at, your Honor. It's almost like a civil case.

"THE COURT: This is not a matter before us. You answer, Mr. Holm.

We find no error prejudicial to defendant in the court's action in regard to the witness Holm. First, it is to be noted that Holm was not an

accomplice or a co-defendant in this case. On the contrary, he was alleged to have been the victim of the assault charged to have been committed by defendant. There was no showing made either expressly or by inference that the prosecuting attorney knew that the witness could or would exercise his claimed privilege. After the grant of immunity the witness testified fully as to the transaction or occurrence in the bar. His testimony tended to support the state's case against defendant. No request was made by the defense for an instruction to the effect that the witness' refusal to answer could not be the basis for an inference favorable either to the prosecution or the defense. The circumstances under which a claim of the privilege against self-incrimination, asserted in the presence of the jury, would be prejudicial to the defendant, is considered in the annotation appearing in 86 A.L.R. 2d 1443 (1962) where the following appears at pages 1444 and 1445:

> "In the few jurisdictions which have recognized that prejudicial error may possibly be committed when a prosecutor calls as a prosecution witness, with the design or purpose of extracting from the witness a claim of privilege against self-incrimination, one criminally involved in the offense for which a defendant is on trial, a finding of reversible error is, in general,

> predicated upon the following combination of facts and circumstances: it must appear directly or inferentially (1) that the witness appears to have been so closely implicated in the defendant's alleged criminal activities that the invocation by the witness of a claim of privilege when asked a relevant question tending to establish the offense charged will create an inference of the witness' complicity, which will, in turn, prejudice the defendant in the eyes of the jury; (2) that the prosecutor knew in advance or had a reason to anticipate that the witness would claim his privilege, or had no reasonable basis for expecting him to waive it, and, therefore, called him in bad faith and for an improper purpose; (3) that the witness had a right to invoke his privilege; (4) that defense counsel made timely objection and took exception to the prosecutor's misconduct; and (5) that the trial court refused or failed to cure the error by an appropriate instruction or admonition to the jury."

See also, Commonwealth v. Granito, 326 Mass. 494, 95 N.E.2d 539 (1950); State v. Lupino, 268 Minn. 344, 129 N.W.2d 294 (1964), cert. den. 379 U.S. 978, 85 S. Ct. 681; 13 L.Ed.2d 569 (1965); Namet v. United States, 373 U.S. 179, 83 S.Ct. 1151, 10 L.Ed. 2d 278 (1963); State v. Mitchell, 268 Minn. 513, 130 N.W.2d 128 (1964), cert. den. 380 U.S. 984, 85 S.Ct. 1351; 14 L.Ed.2d 276 (1965); Annot. 24 A.L.R.2d 895 (1952). In this case where the witness was the alleged victim of the assault charged against defendant, the inference, if any,

to be drawn from his claim of the privilege would be that the witness believed he himself may have committed an offense on the occasion of the assault, which inference would be favorable to the defendant, and not prejudicial.

Defendant cites no authority in support of his contention that the granting of immunity to the witness, in the presence of the jury, was prejudicial, and we are not impressed by his argument in support thereof. Error will not be presumed on appeal, but must be affirmatively shown by the appellant. Morrison v. Quality Produce, Inc., 92 Idaho___, 444 P.2d 409 (1968).

We do not find the remark made by the trial judge to the effect that the witness' answer could not incriminate him to be prejudicial. In addition we note the court's cautionary instruction:

> "The court has no power to charge you upon the facts, or to indicate to you, either directly or indirectly, its views upon the merits. It is the duty of the court to charge you upon the law only. As jurors sworn to try the cause upon the law and the evidence you have no right to assume that the court has any views as to the verdict that should be arrived at as the result of your deliberations in this case. You must enter upon your deliberations with the understanding that the court has no opinion or idea as to what your verdict should be.
>
> "The jury should not consider, or

> in any way, or to any extent, be influenced or controlled by the remarks or statements of the court in ruling upon the admissibility of evidence, or by evidence offered but not received, or by evidence ordered stricken from the record by the court, or by statements of counsel on propositions of law addressed to the court during the course of the trial. Your verdict should be based upon the evidence submitted and admitted at the trial and the instructions of the court applicable thereto, and upon nothing else." Instruction No. 22.

See Feeny v. Hanson, 84 Idaho 236, 371 P.2d 15 (1962).

Defendant assigns as error the failure of the reporter to record all of the oral proceedings had at the trial. At about 6:00 o'clock p.m. on the late afternoon of the second day of the trial during the examination of the state's rebuttal witness, officer Bateman, the tape recorder being used by the reporter developed mechanical failure so that the latter part of the witness' testimony was not recorded and does not appear in the transcript. The reporter certified that the omitted portion would consist of some five or six pages. At this point the court recessed until the following day. No further rebuttal was offered by the state, and defendant rested without offering and surrebuttal.

Mr. Robert K. Hillman, who acted as attorney for defendant at the trial, died pending the appeal

and present counsel for appellant was not present at the trial. However, no effort was made by appellant to procure for the record a statement of what occurred during the brief period following the failure of the tape recorder, nor has any showing been made that anything transpired during that period which prejudiced the defendant. Defendant in his brief does not contend that prejudicial error occurred during that time. He makes the sole contention that since the statute, I.C. § 1-1103, requires the reporter to report all oral proceedings that the failure to make a complete record entitles him to a reversal. In Martinez v. State, 92 Idaho___, 438 P.2d 893 (1968) this court reversed the judgment of the district court quashing a writ of habeas corpus, on the ground that no reporter was present and no record was made at the arraignment of the petitioner upon a charge of rape so that the record did not show affirmatively that he understandingly waived his right to counsel. That case is not in point here. In this case the defendant was ably represented by counsel at the trial and on appeal. No constitutional right has been denied him and no prejudice shown by the mechanical failure of the tape recorder. We think this case falls within the ambit of the Ricks cases [4] rather than the Martinez case.

Defendant also contends a new trial should have been granted by the district court because news publicity in the community where the trial was had, created a prejudicial atmosphere preventing him from having a fair trial. In support of his motion for a new trial defendant presented eleven local newspaper articles which appeared before and during the trial. In these articles references were made to defendant's prior convictions, and certain of the articles contained factual errors. Generally, however, the newspaper stories were restrained and responsible recitals of a doubtlessly newsworthy occurrence. At the opening of the trial and upon voir dire examination of the jurors the trial judge inquired of the jurors as to whether any of them had talked about the case with any of the parties or with anyone who purported to know the facts, and whether any of them had read or heard anything about the case which would cause him to make up his mind concerning the guilt or innocence of the defendant or as to what the facts in the case were. He then reminded the jurors that they must approach the case with an open mind, and that any decision they may make in the case must be based upon the evidence

4. State v. Ricks, 34 Idaho 122, 201 P.827 (1921); State v. Ricks, 32 Idaho 232, 180 P.257, 13 A.L.R. 99 (1919); see Norvel v. Illinois, 373 U.S. 420, 83 S.Ct. 1366, 10 L.Ed. 2d 456 (1963).

that comes from the witness stand, and from no other source. He also reminded the jurors of the jundamental proposition of law that [redacted] accused of crime is innocent until he is proved guilty, and inquired if there were any among them who did not subscribe to that proposition. The jurors were then subjected to voir dire examination by counsel for the respective parties, after which they were sworn, and the trial commenced.

During the course of the trial, the trial judge, addressing the jury, stated that he had been advised by counsel for the defendant that the trial had been referred to on a television program the night before. Thereupon the court admonished the jurors that if any of them had listened to the program, you "pay absolutely no attention to it whatever," and further, "what you will determine will come from this witness stand, and no place else," and in instruction No. 22 the jurors were told:

> "Your verdict should be based upon the evidence submitted at the trial and the instructions of the court applicable thereto, and upon nothing else."

The record does not show an aura of community prejudice resulting from the publicity complained of; that defendant's case was prejudiced; that he was denied a fair trial; or that he was denied due process of law. See State v. Scroggins, 91 Idaho 847, 433 P.2d 117 (1967). The showing as

to publicity is also insufficient to justify a conclusion that the jury received evidence out of court contrary to I.C. §19-2406(2), as suggested by appellant.

Defendant also assigns as error the refusal of his counsel's request for additional time to prepare for trial. Defendant was arrested in May, 1966. The minutes of the court reveal that he was represented by counsel on June 7, 1966. That attorney withdrew from the case June 13th. Attorney Hillman avered in his affidavit that he was contacted by defendant on June 27th; that he investigated the case, and agreed to represent defendant on June 29, 1966. The trial commenced July 20, 1966. Neither the facts nor legal issues involved appear particularly complicated. We are unable to say from this record that defendant was prejudiced for want of further time to prepare for trial. The counsel asserted in his affidavit that he was so busy during the time between his employment and the commencement of trial in preparing to meet the state's evidence, and legal questions which might arise, that he overlooked the publicity given the incident and the possibility of claiming a change of venue. This question of local prejudice was fully developed in support of defendant's motion for a new trial, which, as we have seen, did not result in prejudice to defendant. The granting

or refusing of a motion for a continuance under I.C. § 19-1909, is within the sound discretion of the trial court, and the action of the court thereon will be upheld in the absence of an abuse of that discretion. See State v. Fleming, 17 Idaho 471, 106 P.305 (1910).

Three of defendant's assignments of error challenge the sufficiency of the evidence to sustain his conviction of being a persistent violator. The controlling issue raised is whether the court committed reversible error in the admission into evidence of state's exhibit 6. The exhibit purports to be a photostatic copy of the record of fingerprints taken of one "James B. Polson" at the sheriff's office in Twin Falls County, January 23, 1957. A judgment entered in the district court of Twin Falls County dated July 5, 1957, was admitted in evidence showing a conviction of one "James Polson" of the crime of burglary of the second degree committed on January 22, 1957, in Twin Falls County. Exhibit 6, the fingerprint record, was offered to establish the identity of the defendant as the same individual convicted of burglary of the second degree in Twin Falls County. Identification of the exhibit was attempted to be made through the testimony of Val Johnson, captain of the police department of Idaho Falls. Officer Johnson qualified as an expert on fingerprints and was able to identify the prints

recorded on exhibit 6 as those of the defendant. However, the exhibit bears a certification by the ex-officio recorder of Twin Falls County to the effect that he had compared the photo-copy with the original and found them to be identical. There is nothing in the record to establish the county recorder of Twin Falls County as the keeper of the fingerprint records, by whom such certification should be made under the provisions of I.C.§9-315(6), and officer Johnson testified that the fingerprints were a part of the permanent records of the Twin Falls County sheriff's office. Consequently, the exhibit was not properly identified. In addition the fingerprints were not identified as those of the "James Polson" convicted of burglary of the second degree in Twin Falls County. The offered exhibit was, therefore, subject to defendant's objection that a proper foundation had not been laid for its admission, and that it had not been properly identified. Admission of the exhibit was error. See Kleinschmidt v. Scribner, 54 Idaho 185, 30 P.2d 362 (1934); I.R.C.P.44(a)&44(c).

It was established by other evidence that defendant had been previously convicted of a felony in Bonneville County. The recidivist statute, however, requires proof of three felony convictions. I.C. § 19-2514. Since defendant was not sufficiently identified as the same individual who was

convicted of second degree burglary in Twin Falls County, the judgment convicting him of being a persistent violator must be reversed.

Finally appellant assigns as error the denial of his motion and supplemental motion for a new trial. The errors suggested thereby for the most part have already been considered in this opinion. Other errors suggested have not been supported by argument nor authority and will not be considered further. Supreme Court Rules, rule 41; see Vaughn v. Vaughn, 91 Idaho 544, 428 P.2d 50 (1967).

The judgment on conviction of the crime of assault with intent to murder is affirmed.

The judgment on conviction of being a persistent violator is reversed and that cause is remanded for a new trial.

SMITH, C.J., McQUADE, McFADDEN and SPEAR, JJ., concur.

I hereby certify that on May___, 1969, I served a true and correct copy of the foregoing appendix to Petition for Writ of Certiorari by mail, postage prepaid, on the Attorney General of the State of Idaho and the Prosecuting Attorney of Bonneville County, State of Idaho.

Thomas L. Smith